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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/617,691	07/14/2003	Samuel Clayton Muggride	33277/US	3743

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EXAMINER	
TRAN LIEN, THUY	
ART UNIT	**PAPER NUMBER**
1761	

MAIL DATE	DELIVERY MODE
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/617,691	MUGGRIDE ET AL.	
	Examiner	Art Unit	
	Lien T. Tran	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *23 April 2007*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *2,3,5-12,15,17,18,20-26 and 36-42* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *2-3, 5-12,15,17,18,20-26, 36-42* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

Claims 2-3, 5-12, 15, 17-18, 20-26,36-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over the cookbook " Recipe encyclopedia" in view of Brain et al, applicant's admission of prior art and Wallin et al.

The cookbook teaches a recipe for apricot pie. The recipe teaches the steps of mixing ingredient to create pie dough, forming a portion of the dough into a pie shell placing fruit pieces onto the shell, spooning on filling suspension onto the fruit, smoothing the filling surface, applying a top sheet of pie dough, fitting the sheet over the top of the pie, pressing the dough layers to seal and baking the pie.

The cookbook recipe differs from the claimed method in the use of the type of fruit and the type of suspension. Also, the recipe does not disclose transporting in frozen state.

Applicant discloses on page that it is known to use IQF fruit in making fruit pie.

Brain et al disclose a pie filling. The filling comprises sweetener in amount from 10-60%, a stabilizer in amount from 0-5%, starch in amount from .5-3% and water in amount from 40-80%. The filling is prepared by mixing water with stabilizer and starch, mixing sweetener, remaining water, heating of the sweetener mixture, adding the stabilizer mixture and finish heating the mixture to obtain the filling. The stabilizer includes carrageenan or other suitable hydrocolloid. (see example XIII)

Wallin et al disclose a filling suspension. They teach to increase the amount of starch to adjust the viscosity of the suspension. (see col. 5 lines 1-22)

It would have been obvious to one skilled in the art to substitute the canned apricot for IQF fruit because the use of IQF fruit in making fruit pie is known in the art as

shown on page 1. To substitute one conventional fruit for another conventional fruit would have been obvious. It would also have been obvious to substitute the filling for the filling disclosed by Brain et al because the substitution of one conventional filling for another conventional filling would have been obvious to one skilled in the art. It would have been obvious to convey the pie in a frozen state when IQF fruit is used because the fruit is frozen. It is obvious the fruit remains frozen because frozen fruit is used and there is no indication the fruit will thaw during processing. The suspension of Brain et al differs from the claimed suspension in the use of sweetener dissolved in water instead of a combination of dried sweetener and liquid sweetener. However, it would have been obvious to one to substitute a conventional liquid sweetener such as corn syrup and to use a combination of liquid sweetener and dried sweetener depending on the flavor desired. Such variation would have been obvious to one skilled in the art. It would have been obvious to one skilled in the art to add additional starch when desiring to adjust the viscosity of the filling to certain level. Wallin et al teach the amount of starch used in the filling can be adjusted to obtain a desired viscosity. It would have been obvious to one skilled in the art to adjust the steps disclosed by Brain et al when different sugar components are used. This can readily be determined by one skilled in the art without undue experimentation. With regard to the product-by-process claims, how the product is made does not determine its patentability. The reduction and increase in viscosity during initial state and during baking is a natural occurrence due to the presence of the starch and gum. When the suspension of Brain et al is used in a pie product, the same thing will occur. When a pie product is frozen, the suspension

deposited over the fruit will also be frozen. When the pie is heated, the suspension will thaw causing a decrease in viscosity. As the pie is heated, the starch in the suspension will begin to gelatinize causing its viscosity to increase. The suspension of Brain et al contains starch. The suspension as shown by the recipe is deposited as layer because it is placed on top of the fruit. The suspension dispersed during baking because it is a fluid medium; this will also take place when the Brain et al suspension is used in the pie because the suspension is also a fluid medium.

In the response filed 4/23/07, applicant argues that the recipe does not provide any motivation or expectation of success to provide a suspension which in a baked state migrates together with IQF fruit to form an IQF fruit suspension. Applicant makes the same argument with respect to the other references. This argument is not persuasive because applicant argues the references individually without taking into consideration what the combination would have suggested to one skilled in the art. The recipe teaches to deposit fruit on the bottom of the crust and then spoon on the filling to have a smooth surface. This is equivalent to the claimed step of adding fruit and depositing a suspension. The recipe does not restrict the type of pie filling; thus, it would have been obvious to one skilled in the art to use any known pie filling such as the one disclosed by Brian et al. One would be motivated to the filling disclosed by Brian et al because it is taught that the filling has improve texture and flavor characteristics. The property of the suspension layer and the fruit migrating together will take place when the Brian et al suspension is used with the apricot fruit filling because the suspension is a fluid medium which will disperse during baking. The Brian

et al reference is not relied upon for the teach of a pie preparation method because the recipe already teaches the steps of preparing a pie. The Wallin reference is only relied upon to show that the viscosity of a filling can be altered by adjusting the amount of starch. Applicant argues the rejection is based on hindsight. The examiner respectfully disagrees because the rejection is based on the disclosure and teaching of prior art.

Applicant further argues none of the references teaches or suggests a method for manufacturing a pie filled with frozen fruit in which the IQF fruit remains frozen throughout the manufacturing process. The rejection takes the position that it would have been obvious to use IQF instead of canned fruit because it is known to use IQF fruit in pie as disclosed on page 1 of the specification. In the process of making a pie, the fruit is deposited, the filling layer is spooned on the fruit, then the top crust is placed. These are quick succession of steps and the frozen fruit would not thaw in short amount of time. The specification does not disclose any active step taken to prevent the IQF from thawing. It is not disclosed that the preparation of the pie takes place in a cold environment such that the IQF fruit does not thaw. Applicant argues any fruit added, if it were initially frozen, would begin to thaw once the apricot pie filling is added. This argument is not supported by factual evidence. If the argument is true, the same question can be raised against the claimed method because once the suspension is deposited , the fruit would begin to thaw too. The specification does not disclose any measure or step taken to keep the IQF fruit from thawing. Applicant points to the fact that Brian discloses hot filling the pie filling into a suitable containers; thus , if the container were a pie pastry, adding the pie filling to it would cause any frozen fruit to

rapidly thaw. This argument is not persuasive because it takes the disclosure out of context. The filling step disclosed in Brian is filling into container for storage; there is no disclosure at all that the filling goes straight into a pie crust. Applicant further argues that to maintain IQF fruit in a frozen state, the IQF fruit would need to remain at a temperature of about 32 degree F and the pie preparation processes are presumed to be performed at room temperature (e.g. 70-75 degree F) which has the tendency to cause the fruit to thaw. This argument is not commensurate in scope with the claims because there is no limitation in the claims about maintaining the IQF at 32 degree F. In fact, the specification does not disclose any step or condition taken such as the IQF remains frozen throughout the manufacturing process. The fruit remains frozen due to its nature of frozen fruit. Furthermore, there is no disclosure to presume that the pie preparation process takes place at room temperature. For instance, if the pie is prepared in a well air-condition room, the temperature is not necessary the room temperature cited by applicant.

Applicant's arguments filed 4/23/07 have been fully considered but they are not persuasive.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Hendricks Keith can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

July 5, 2007

Lien Tran

LIEN TRAN
PRIMARY EXAMINER
Group 1700